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DEPARTMENT OF JUSTICE



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October 29, 2009

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The Attorney General's California
Law Enforcement Telecommunications
System Advisory Committee

Re: Vehicle Code Sections 2431 and 12517.3

Dear Members:

Vehicle Code section 2431 mandates the California Highway Patrol (CHP) perform a preliminary criminal offender record information (CORI) inquiry of temporary tow truck driver certificate candidates via the California Law Enforcement Telecommunications System (CLETS). Vehicle Code section 12517.3 allows the CHP to perform a preliminary CORI and Department of Motor Vehicle inquiry for various types of bus driver certificate candidates.

A legal review of these sections has determined that they violate the *Central Valley versus Younger* decision and subsequent injunctions. The Department of Justice (DOJ) was the defendant in this case. Accordingly, on October 22, 2009 the CHP was noticed to discontinue utilizing the CLETS for Vehicle Code sections 2431 and 12517.3 purposes (letter enclosed). This will not result in certification without the benefit of a CORI search as the sections each mandate that fingerprint images be submitted to the DOJ for this purpose.

Section 1.6.1 (E) (2) (b) of the CLETS Policies, Practices and Procedures (PPP) details the Vehicle Code section 2431 mandate as an exceptional use of the CLETS. As such, a draft revision to Section 1.6.1, proposing deletion of the Vehicle Code section 2431 mention, is enclosed for your review. The CLETS PPPs do not mention Vehicle Code section 12517.3. The CLETS Advisory Committee will be asked to formally approve this proposed CLETS PPP revision at the next meeting.

Should you have any questions, please let me know.

Sincerely,


GARY COOPER, Chair
CLETS Advisory Committee

Enclosures



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DEPARTMENT OF JUSTICE

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October 22, 2009

John R. McDonough
Senior Supervising Counsel
California Highway Patrol
Office of Legal Affairs
P.O. Box 942898
Sacramento, CA 94298-0001

RE: CHP Access to CLETS for Vehicle Code sections 2431 and 12517.3 Purposes

Dear Mr. McDonough:

As we have previously discussed, plaintiffs in the case *Central Valley et al. v. Younger* have informed the Department of Justice that the CHP's access to the state criminal history database via CLETS pursuant to Vehicle Code sections 2431 and 12517.3 for purposes of issuing a temporary certificate to drive certain types of vehicles violates injunctions and a judgment issued against the Department of Justice in *Central Valley*.

In *Central Valley*, the plaintiffs filed an action challenging the Department's then practice of disseminating an individual's complete criminal history information, including instances where a person was arrested but not convicted of an offense (nonconviction information), to entities not specifically authorized to receive the information. The courts held that dissemination of nonconviction information to potential employers and licensing agencies, except in certain circumstances, violated the state constitutional right to privacy. (See *Central Valley Chap. 7th Step Found. v. Younger* (1979) 95 Cal.App.3d 212 (*Central Valley I*); *Central Valley Chap. 7th Step Found. v. Younger* (1989) 214 Cal.App.3d 145, 165 (*Central Valley II*).

Over the course of several years, the Alameda County Superior Court issued a series of injunctions and a judgment that imposed limitations on the type of criminal history information that the Department could release for employment, licensing, and certification purposes. (See *Central Valley II, supra*, 214 Cal.App.3d at pp. 153-55.) For licensing and certification purposes, the injunctions and judgment barred release of criminal history information in instances where: (1) a person had successfully completed a diversion program; (ii) a person had been exonerated of the offense for which he or she was initially arrested; (iii) DOJ had not first attempted to verify the final disposition of an arrest; and (iv) a person had not been convicted of the offense for which he or she was arrested (collectively, the "enjoined information"). (*Id.* at pp. 154-55.) The Department was barred from disclosing an individual's criminal history

John R. McDonough
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Page 2

information to an employment or licensing agency without first removing the enjoined information. (*Id.* at p. 165.)

The CHP's utilization of CLETS under Vehicle Code sections 2431 and 12517.3 would give the CHP access to enjoined information that it ordinarily could not receive for certification. The *Central Valley* court would likely conclude that the CHP's utilization of CLETS for the certification purposes violates the injunctions and judgment. The Department has litigated a similar issue. In 1995, the Department made a motion to modify the injunctions and judgment to permit the Department of Health Services (DHS) to directly access criminal history information via CLETS pursuant to two statutes. (See former Health and Safety Code, §§ 1338.5 and 1746.6 [giving DHS CLETS access to conduct background checks for persons seeking employment as nurses assistants or home health aides.].) The court ultimately denied the Department's request to modify the injunctions. The court concluded that permitting an agency to access enjoined information via CLETS would violate the injunctions and judgment, and that a statutory right to CLETS access did not trump the constitutional right to privacy protected by the injunctions and the judgment. A copy of the court's March 6, 1996 order is enclosed for your review.

In light of the 1996 order, the Department directs the CHP to discontinue utilizing CLETS for Vehicle Code sections 2431 and 12517.3 certification purposes. If you have any questions, please feel free to contact me.

Sincerely,



HIREN PATEL
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

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FILED
ALAMEDA COUNTY

MAR - 6 1996

RONALD G. OVERKOLT, Esq. Of/Clerk
By F. M. Gonzalez

7 SUPERIOR COURT OF CALIFORNIA
8 COUNTY OF ALAMEDA

9 CENTRAL VALLEY CHAPTER OF THE)
7TH STEP FOUNDATION, INC.,)
10 et al.,)
11 Plaintiffs,)
12 vs.)
13 EVELLE J. YOUNGER, Attorney)
General of the State of)
14 California, et al.,)
15 Defendants.)
16 _____)
GARY GRESHER, et al.,)
17 Plaintiffs,)
18 vs.)
19 GEORGE DEUKMEJIAN, et al.,)
20 Defendants.)
21 _____)

Nos. 497394-6,
524298-6

~~PROPOSED~~ ORDER AND
STATEMENT OF DECISION
SUSTAINING OBJECTIONS TO
DECLARATIONS SUBMITTED BY
DEFENDANT AND DENYING
MOTION AND SUPPLEMENTAL
MOTION FOR MODIFICATION
OF INJUNCTION

DATE: February 7, 1996
TIME: 9:00 a.m.
DEPT: No. 81
Hon. Sandra Margulies

22 The Motion for Modification of Injunction filed by
23 defendants Attorney General of the State of California, et al.,
24 was heard on February 7, 1996, in Department 81 of the Alameda
25 County Superior Court, Judge Sandra Margulies presiding. Allen
26 Sumner, Assistant Attorney General, appeared as attorney for
27 defendants; Peter E. Sheehan, Legal Aid Society of Alameda
28 County, appeared as attorney for plaintiffs; and Mary Stober,

1 staff attorney with the Department of Health Services, appeared
2 as attorney for intervenor Department of Health Services.

3 After considering the documents submitted in opposition and
4 in support of the motion, the arguments of counsel, and taking
5 judicial notice of the contents of this court's files in these
6 actions, the court rules as follows:

7 1. Plaintiffs' objections to the following parts of the
8 declaration of Jack Scheidegger are sustained on the following
9 grounds: (i) the testimony at page 2, lines 1 to 2 of the
10 Scheidegger declaration is inadmissible as lacking sufficient
11 foundation; (ii) the testimony at page 2, lines 8 to 10 of the
12 Scheidegger declaration is inadmissible opinion testimony; and
13 (iii) the testimony at page 2, lines 23 to 26 of the Scheidegger
14 declaration beginning with the words "The Department has
15 concluded" is inadmissible hearsay, is lacking sufficient
16 foundation, is inadmissible opinion testimony, and is
17 irrelevant.

18 2. Defendants assert that legislation regarding the
19 licensing of nurse assistants and home health aides (hereafter
20 referred to as "Chapter 1247") requires defendants to provide
21 Health Services with direct on-line access to defendants' data
22 base of criminal history information. Defendants assert that
23 modification of the judgment is necessary because providing such
24 access would result in Health Services receiving information
25 prohibited by the judgment. The Court denies the motion on the
26 grounds set forth below.

27 3. Chapter 1247 does not require that Health Services be
28 given on-line access to the criminal history system data base

1 and thus there is no necessity to modify the injunction.
2 Chapter 1247 provides that Health Services shall "utilize CLETS"
3 and the "data obtained from CLETS," and have "access to CLETS."
4 See Health & Safety Code §1338.5; Government Code §15675.
5 "CLETS" refers to the California Law Enforcement
6 Telecommunications System and access to CLETS does not require
7 access to the automated criminal history system data base.
8 Government Code §15100. Interpreting the statute in this
9 fashion avoids difficult constitutional questions and harmonizes
10 Chapter 1247 with existing California and federal law which
11 provide that "noncriminal justice agencies shall not receive
12 criminal offender record information directly from an automated
13 criminal justice system." 11 Cal. Code of Regs. §707(a). See
14 also 28 C.F.R. 2120.21(f)(3)(i)(a) (automated state arrest
15 record systems must store information "in such manner that it
16 cannot be ... accessed in any fashion by non-criminal justice
17 terminals").

18 4. Modification is further unnecessary because Chapter
19 1247 does not require defendants to release any information
20 prohibited by the judgment. Chapter 1247 bases
21 disqualifications solely on conviction grounds and does not
22 provide that defendants must disseminate the entire or complete
23 record. Development of computer programs, such as illustrated
24 by defendants' compliance with the injunctions in Hooper v.
25 Deukmejian or other methods (including requiring the submission
26 of fingerprints) will enable defendants to comply with Chapter
27 1247 and the judgment.

28 5. If Chapter 1247 were interpreted to require the

1 release of information covered by the injunctions, the Court
2 would deny defendants' motion because, as set forth below,
3 defendants and Health Services have not satisfied the standards
4 for modification of a permanent injunction based on a change in
5 law (the only ground asserted on this motion).

6 6. The Court denies the motion to the extent it seeks to
7 authorize or permit the dissemination of exoneration information
8 to Health Services or to modify the exoneration injunction in
9 any manner. The issue of the validity of defendants'
10 dissemination of exoneration information to licensing agencies
11 was considered and litigated in this action. See injunction
12 prohibiting dissemination of exoneration information (hereafter
13 "Exon. Inj.") at 2:17-21; 3:26-28; Central Valley Chapter of 7th
14 Step Foundation v. Younger (1989) 214 Cal.App.3d 145, 154
15 (hereafter "Central Valley II"). This Court determined that
16 defendants' dissemination of exoneration information to
17 licensing agencies violated the right or privacy guaranteed by
18 the California and federal Constitutions. Exon. Inj. at 2:17-
19 21. Defendants did not appeal that determination or the
20 exoneration injunction. Central Valley II, supra, 214
21 Cal.App.3d at 159-160 n. 7 and 169. Under the doctrine of res
22 judicata and the requirements for modification of an injunction,
23 that determination is conclusive absent a showing that the law
24 underlying the exoneration injunction has changed. Defendants
25 and Health Services fail to establish that there has been a
26 change in the law.

27 a. First, defendants and Health Services have not
28 asserted that there has been any change in the law regarding the

1 federal constitutional right of privacy as it applies to this
2 case. See Health Services MPA filed December 5, 1995; Health
3 Services MPA filed January 29, 1996; defendants' MPA filed June
4 26, 1995; defendants' MPA filed January 11, 1996. The only
5 arguments advanced by Health Services or the defendants
6 regarding a change in law pertain to the alleged change in the
7 California constitutional right of privacy allegedly brought
8 about by the decision in Hill v. National Collegiate Athletic
9 Association (1994) 7 Cal.4th 1. Hill is specifically limited to
10 the California constitutional right of privacy. Id. at 9.

11 b. Second, defendants and Health Services
12 incorrectly assert that there has been a change in the
13 California constitutional right of privacy as it applies to this
14 case. Hill did not override either of the Central Valley
15 decisions, did not suggest that dissemination of exoneration
16 information or other types of nonconviction data was legitimate,
17 and did not adopt a test for governmental intrusions on the
18 right of informational privacy. Hill, supra, 7 Cal.4th at 21,
19 35, 38. See also Estate of Gallo (1995) 33 Cal.App.4th 592, 597
20 (post-Hill informational privacy case applying a test similar to
21 that employed in Central Valley II, supra, 214 Cal.App.3d at
22 171).

23 c. Third, the arguments based on cost which
24 defendants and Health Services now assert are substantially the
25 same as arguments which were previously made by defendants and
26 rejected by the Court of Appeal. See, e.g., Opening Brief on
27 Cross Appeal and Respondents' Brief on Second Appeal at 21 ("the
28 issue is whether dissemination of information to a recipient who

1 is prohibited from using or divulging the information is a
2 violation" of privacy); Id. at 22-24 (requiring the
3 nondissemination of incomplete information and nonconviction
4 information would be costly); Respondents' Brief on First Appeal
5 at 50-51 (requiring deletion of nonconviction data would be
6 costly and impact law enforcement interests).

7 The Court of Appeal rejected these contentions by finding
8 that administrative burden could not justify the infringement on
9 plaintiffs' rights and that the burden was not substantial in
10 light of Penal Code §11105 subd. (e). See Central Valley
11 Chapter of 7th Step Foundation v. Younger (1979) 95 Cal.App.3d
12 212, 237-240 (hereafter "Central Valley I"); Central Valley II,
13 supra, 214 Cal.App.3d at 162-163. Under the law of the case
14 doctrine, this Court is required to reject the substantially
15 identical contentions of Health Services and defendants. Benson
16 v. Greitzer (1990) 220 Cal.App.3d 11, 13-15 (law of case
17 requires court to reject substantially similar arguments for an
18 award of attorneys fees even though based on a different
19 attorney fee statute than statute first considered by Court of
20 Appeal).

21 7. The Court denies the motion to the extent it seeks to
22 authorize or permit the dissemination of arrest without
23 disposition information (hereafter "incomplete and inaccurate
24 information") to Health Services or to modify in any manner
25 paragraph II of the Judgment. The issue of the validity of
26 defendants' dissemination of incomplete and inaccurate
27 information to licensing agencies was considered and litigated
28 in this action. Judg. at 3:13-16; 4:9-13; Central Valley II,

1 supra, 214 Cal.App.3d at 165. This Court determined that
2 defendants' dissemination of incomplete and inaccurate
3 information to licensing agencies violated the right of privacy
4 and the equal protection guarantees of the California
5 Constitution. Judg. at 4:7-13. This determination was
6 challenged by defendants but affirmed by the Court of Appeal on
7 the second appeal. Central Valley II, supra, 214 Cal.App.3d at
8 165. The Court of Appeal found that defendants' policy of
9 disseminating incomplete and inaccurate information violated the
10 right of privacy, "promote[d] the use of incomplete and
11 inaccurate information, contrary to the legislative interest in
12 completeness" (Central Valley II, supra, 214 Cal.App.3d at 165)
13 and, in cases of diversion, violated the diversion statutes.
14 Id. at 170. The Court of Appeal's general affirmance of the
15 judgment establishes that it is res judicata as to all the
16 issues passed upon by this Court, including the finding of an
17 equal protection violation. Bank of America v. McLaughlin
18 (1940) 40 Cal.App.2d 620, 628-629. Under the doctrine of res
19 judicata and the requirements for modification of an injunction,
20 this Court's determinations of constitutional violations are
21 conclusive absent a showing that the law underlying the judgment
22 has changed. Defendants and Health Services have failed to
23 establish a change in the law for the reasons set forth above
24 and because defendants have not asserted that there has been any
25 change in the law regarding the equal protection guarantee or
26 the diversion statutes as they apply to this case.

27 8. The Court denies the motion to the extent it seeks to
28 authorize or permit the dissemination of diversion information

1 to Health Services or to modify the diversion injunction in any
2 manner. The issue of the validity of defendants' dissemination
3 of diversion information to licensing agencies was considered
4 and litigated in this action. See injunction prohibiting
5 dissemination of diversion information (hereafter "Diversion
6 Inj.") at 2:23-26; 2:3-15; Central Valley II, 214 Cal.App.3d at
7 153. This Court determined that defendants' dissemination of
8 diversion information to licensing agencies violated the right
9 or privacy guaranteed by the California Constitution. Diversion
10 Inj. at 2:3-15. Defendants did not appeal that determination or
11 the diversion injunction. Central Valley II, supra, 214
12 Cal.App.3d at 159-160 n. 7 and 169. Under the doctrine of res
13 judicata and the requirements for modification of an injunction,
14 that determination is conclusive absent a showing that the law
15 underlying the diversion injunction has changed. Defendants and
16 Health Services fail to establish that there has been a relevant
17 change in the California constitutional right of privacy for the
18 reasons set forth above.

19 9. This Court's judgment entered on July 29, 1985,
20 remains in full force and effect and is not modified to any
21 extent.

22
23 DATED: 3/6/96

Sandra Mangalika
JUDGE OF THE SUPERIOR COURT
24
25
26
27
28

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE
COUNTY OF ALAMEDA
DEPARTMENT 81
SANDRA MARGULIES, JUDGE OF THE SUPERIOR COURT
CLERK'S NOTICE IN RE RULING

497394-6

CENTRAL VALLEY CHAPTER OF THE
7TH STEP FOUNDATION, et al.,

v. EVELLE J. YOUNGER, et al.,

In the above entitled matter, the court having taken the matter under submission on Feb 7, 1996, now enters its decision, a copy of which is attached hereto and incorporated by reference as a part of this notice.

By: Frances Michel, Court Clerk

DECLARATION OF MAILING

I certify that I am not a party to this cause and that on the date stated below I mailed (first class, postage pre-paid) a copy of this notice to the parties thereto, addressed as follows:

PETER E. SHEEHAN, ESQUIRE
LEGAL AID SOCIETY OF ALAMEDA COUNTY
510 16th Street, 4th Floor
Oakland, Ca 94612

ENDORSED
& FILED
ALAMEDA COUNTY

MAR - 6 1996

RONALD G. OVERKOLT, Exec. Off./Clerk
By F. M. Gonzales

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I declare under penalty of perjury that the same is true and correct. Executed on March 6, 1996.

Frances Michel
Court Clerk

1.6 SYSTEM RULES

System rules are designed to provide the most efficient operating system consistent with the needs of law enforcement. Adherence to the rules will ensure client agencies the maximum effectiveness of the CLETS. Violations of the CLETS or the NCIC rules will result in an investigation and appropriate disciplinary action as determined by the CA DOJ in consultation with the CAC.

1.6.1 Database Policies and Regulations

All users shall abide by all policies and regulations pertaining to the information from the CLETS. Procedures and message formats contained in user manuals must be followed exactly.

- A. Users must confirm the validity of the positive response on the record by contacting the entering agency prior to taking enforcement actions based solely on that record.
- B. Periodic driver license checks may be conducted on the CLETS subscribing agency employees where driving is a requirement of their job.
- C. Details of state summary criminal history information may be received by an agency-approved wireless device, provided all wireless access security requirements are met (see PPP section 1.6.9).
- D. Pursuant to the California Code of Regulations, Title 11, Division 1, Chapter 7, Article 1, section 707(c), every agency is required to keep a record of each release of criminal offender record information for a minimum of three years from the date of release. Detailed information regarding retention of information can be found in this code section.
- E. The CA DOJ Automated Criminal History System Prohibitions:
 - 1. In reference to U.S. Code, Title 18, Section 922(G)(9), terminals are prohibited from accessing the CA DOJ Automated Criminal History System to enforce the provisions of Title 18 USC section 922(G)(9) which effects a lifetime firearms or ammunition prohibition for anyone convicted of a misdemeanor crime for domestic violence.
 - 2. Terminals are not authorized to access the CA DOJ Automated Criminal History System through the CLETS for licensing, certification or employment purposes, including pre-employment

background investigations for sworn peace officers and/or law enforcement employees as specified in Penal Code (PC) section 830, et al; or for remotely accessing a record for review and/or challenge by the subject of a record.

Exceptions:

- a. Pursuant to Education Code sections 45125.5 and 35021.1, a law enforcement agency may agree to provide a school district or county office of education specific state summary criminal history information from the CLETS on a prospective non-certificated employee or non-teaching volunteer aide. If the law enforcement agency agrees to provide the state summary criminal history information, the results shall be returned to the requesting district or county office of education within 72 hours of the written request. The law enforcement agency may charge a fee to the requesting agency not to exceed the actual expense to the law enforcement agency. For purposes of this section only, a school police department may not act as its own law enforcement agency.
- ~~b. Pursuant to Vehicle Code section 2431, the California Highway Patrol (CHP) may utilize the CLETS to conduct a preliminary criminal offender record information search on applicants for tow truck drivers and employers.~~
- ~~eb.~~ Pursuant to PC section 11105.03, a law enforcement agency is authorized to furnish specific state summary criminal history information from the CLETS to a regional, county, city or other local public housing authority for screening prospective participants as well as potential and current staff. The only state summary criminal history information that can be released must be related to adult convictions for specific felonies or a domestic violence offense. Information released to the local public housing authority shall also be released to parole or probation officers at the same time, if applicable. For purposes of this section only, a housing authority police department may not act as its own law enforcement agency unless approved on an individual basis by the CA DOJ.
- ~~ed.~~ Pursuant to the Code of Civil Procedures section 1279.5(e), the courts shall use the CLETS to determine whether an applicant for a name change is under the jurisdiction of the Department of Corrections and Rehabilitation or is required to register as a sex offender pursuant to PC section 290. If a court is not equipped with the CLETS, the clerk of the court shall contact an appropriate local law enforcement agency

that shall determine whether the applicant is under the jurisdiction of the Department of Corrections and Rehabilitation or is required to register as a sex offender pursuant to PC section 290.

ed. Pursuant to PC section 11105.6, a law enforcement agency may access state summary criminal history information from the CLETS to notify bail agents if a fugitive has been convicted of a violent felony.

fe. Pursuant to Welfare and Institutions Code section 16504.5, county child welfare agency personnel conducting an investigation for the purposes described in this code section are entitled to state summary criminal history information from the CLETS by an appropriate governmental agency. Law enforcement personnel shall cooperate with the requests for the information and shall provide the information to the requesting entity in a timely manner.

F. DOJ Automated Criminal History System allowances:

1. Staff of any law enforcement or correctional/detention facility may process online criminal offender record information inquiries on any visitor to such facility.
2. A preliminary criminal offender record information search may be performed on any person prior to the approval as a "ride-along" with a law enforcement officer, provided that person is not an employee of the law enforcement agency.
3. In reference to California Penal Code Section 13202, access to the DOJ Automated Criminal History System is allowed for law enforcement statistical or research purposes only upon approval by the CA DOJ.